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IN THE

Supreme Court of the United States

October Term, 1958

No. 349

W O R Z, Inc., *Petitioner,*

v.

Federal Communications Commission

and

Mid-Florida Television Corp., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 8, 1958

Press of Byron S. Adams, Washington, D. C.

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IN THE

Supreme Court of the United States

October Term, 1958

No.

W O R Z, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WORZ, Inc., appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which was entered in this case on May 15, 1958, affirming the action of the Federal Communications Commission in denying petitioner's application for television facilities at Orlando, Florida.

OPINION BELOW

The opinion of the Court of Appeals (Appx. p. 1a) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1954. (Appx. 2a.) By order dated June 10, 1958, that Court denied appellant's petition for a rehearing *en banc*. (Appx. 3a.) The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals rendered an opinion *per curiam* in this case wherein it merely held: "After reviewing appellant's contentions, we find no basis for disturbing the Commission's award." (Appx. 1a.) Therefore, it must be assumed that the questions raised against the Commission were decided in its favor. Two of these questions are here presented for authoritative answers:

1. Whether, under *Universal Camera Corporation v. National Labor Relations Board,* 340 U. S. 474, the court below improperly condoned, and improperly failed to find erroneous, the action of the Commission in basing findings on selected parts of the record and disregarding other parts which would require different findings, and whether the court below was required, under the Administrative Procedure Act, to review the *whole* record.

2. Whether the court below improperly condoned, and improperly failed to find erroneous, the action of the Commission in *prejudging* a primary issue and in thus failing to provide the quality of *fairness* in administrative operation which is an inherent overall requirement of the Administrative Procedure Act and is an essential ingredient of that due process which is guaranteed by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

Section 10(e) of the Administrative Procedure Act, "An Act to improve the administration of justice by prescribing fair administrative procedure", 5 U. S. C. 1009, provides, in pertinent part:

> (e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

This petition seeks review of a judgment (Appx. 2a.) affirming a decision and order (R. 201-309) of the Federal Communications Commission which granted

the application of Mid-Florida Television Corp. (Mid-Florida) for a construction permit for a new television station at Orlando, Florida, and denied the mutually exclusive application of WORZ, Inc. (WORZ), petitioner herein, for the same facilities at Orlando.

WORZ is the parent corporation of Central Florida Broadcasting Company, licensee of standard broadcast station WKIS (formerly WORZ) and frequency modulation station WORZ (formerly WKIS) in Orlando. Most of the stockholders of the corporation are residents of Orlando, the president and controlling stockholder being Naomi T. Murrell. Other principals are her daughter, son, and son-in-law. The balance of the voting stock is held by business men in the Orlando area and by WORZ's subsidiary, Central Florida Broadcasting Company. (R. 204-214.)

Mid-Florida had two classes of stock subscribers—"A" and "B"—and no stockholders. The "B" subscribers were all non-residents of Florida, were entitled to and did elect three of the five directors, and owned and operated standard broadcast station WLOF, Orlando, Florida, through Mid-Florida Radio Corp., which they had just purchased from Florida owners. (R. 240, 352-353.)

The WORZ and Mid-Florida applications were the subject of a full comparative hearing before the Commission.[1] Prior thereto, upon petition of Mid-Florida, the Commission inserted two special issues, one to determine whether or not WORZ and its

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[1] There were not placed in issue the minimum qualifications—legal, financial, and technical—of either WORZ or Mid-Florida, those qualifications having been conceded by the Commission.

subsidiary had made any misstatements[2] of material facts or omitted to state material facts concerning their ownership and/or management, and the other to determine whether or not Mrs. Murrell's husband was a "party in interest"[3] in WORZ. (R. 201-202.)

The Hearing Examiner's Initial Decision (R. 70-136) proposed a grant of the WORZ application, his preference being based upon "many reasons" of which 12 were listed as being "the most important" (R. 133-136). Mid-Florida was not accorded a single point of preference. Among those mentioned in favor of WORZ were the greater integration of local ownership with management, the better service rendered by the WORZ AM and FM Stations than by WLOF after it was acquired by the Mid-Florida Class "B" stock subscribers, more accessible and more adequate studios, it being doubted, further, that the studio building proposed by Mid-Florida would ever be available,[4] and the truthfulness of the WORZ representations concerning its studio location as

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[2] As hereinafter shown, the Commission, in its decision, admitted that it would not have inserted the "misstatements" issue if it had believed that any misstatements were "merely inadvertent".

[3] As noted by the Examiner in his Conclusions (R. 118): "17. The term 'party in interest' is not defined in the Communications Act, as amended, or in the Commission's Rules. It is not defined in the issues adopted by the Commission in its Order of October 14, 1954." It has still not been officially defined by the Commission but, during the exchange of briefs in the court below, its General Counsel agreed that the term means a "'principal'—a person who is an officer, director, or substantial stockholder, or who is in a position effectively to exercise control or to influence corporate or managerial decision by any legitimate means."

[4] This doubt of the Examiner proved to be well founded in actual fact. The proposed studio building did not become available. Instead, Mid-Florida leased space elsewhere.

compared with the misrepresentations of Mid-Florida. The Examiner found (R. 121) that Mr. Murrell, Sr., was not a "party in interest" in WORZ and (R. 135) that the Mid-Florida attorney, secretary, and director, Hyman N. Roth, had, on its behalf, sought to deceive and mislead the Commission and that his associates had made no attempt to disavow his action.

Approximately one year after considering exceptions to the Initial Decision and oral argument by the parties, the Commission issued its final 95-page, single-spaced Decision overruling the Examiner, denying the application of WORZ, and granting that of Mid-Florida.[5] The Commission, in complete disagreement with its Examiner, found that WORZ had intentionally made misstatements to the Commission as to its ownership and management, that Mr. Murrell, Sr., was a "party in interest", and that the other members of the family were lacking in candor in their statements to the contrary. (R. 297-302.)

It is impossible to determine the exact amount of weight given by the Commission to its conclusion (#57, R. 299) that the members of the Murrell family displayed a lack of candor in their testimony relating to the party-in-interest issue and also to its conclusion (#59, R. 300), based upon circumstantial evidence, that the misstatements and omissions in the WORZ reports and applications were knowingly and intentionally made for the purpose of misleading the Commission. However, the weight is considered

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[5] The comparative hearing was held in December 1954 and March 1955. The Initial Decision was released on August 10, 1955. The Commission heard oral argument on June 18, 1956, and released its Decision on June 7, 1957. Mid-Florida, at its peril, elected to proceed with construction under its permit pending the outcome of review proceedings.

to have been of decisional importance because the Commission clearly stated (Concl. 61, R. 300) that those matters "must weigh heavily against this applicant in our disposition of this proceeding." Later, in comparing WORZ and Mid-Florida in the area of character qualifications, the Commission concluded (#76, R. 308) that "the conduct of the principals of WORZ weigh much more heavily against a grant to that applicant than does that of Mr. Roth against grant of the application of Mid-Florida."

The primary reason for granting the Mid-Florida application was the greater broadcast experience of Joseph L. Brechner (R. 307-308), characterized by the Mid-Florida counsel in the court below as "President, director, general manager and dominant force". Along with Mr. Brechner's experience, the Commission relied upon his representation that he would move to Orlando upon "receiving this grant", would "become general manager, and actively direct the daily operation of WLOF-TV, participating in its day-to-day management."[6] (R. 248, 277.)

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[6] The grant to Mid-Florida was made on June 6, 1957, and the station went on the air on February 1, 1958. However, at the time of the argument in the lower court on April 1, 1958, *nine months after the grant*, Mr. Brechner still had not fulfilled his promise to move to Orlando and manage the station. Mid-Florida's counsel admitted this fact during the argument. Also, when the station went on the air it did so under an authorization issued by the Commission on the basis of a defective license application—one that did not contain a balance sheet reflecting the construction cost, as required. Although requested to supply this information, Mid-Florida had, up until noon on September 2, 1958, *more than seven months later*, failed to do so in acceptable form. Accordingly, the license application has not yet been granted. Of course, these facts are not part of the record here, which was closed in March 1955.

The pertinent conclusions adverse to WORZ were based upon findings which were, in turn, based upon material proposed by Mid-Florida or by the Commission's Broadcast Bureau; in fact, in many instances the language was copied *verbatim*. There was no independent examination of the *whole* record; instead, only those parts appeared in findings that tended to support the desired conclusions, and there was omitted anything which detracted therefrom.

Upon the primary issue involving WORZ, namely, the so-called special issue[7] as to whether WORZ had misrepresented or failed to disclose material facts relating to ownership and control, the Examiner found (R. 117-118) that "Mrs. Naomi T. Murrell, William O. Murrell, Jr. [her son], Joaquin M. Hill [her daughter] and Eugene D. Hill [her son-in-law] did not intentionally make any statement in the exhibits or testimony with the view of deceiving or misleading the Hearing Examiner, the Commission or any party to the proceeding" as to the alleged managerial status of Mr. Murrell, Sr. In overruling the Examiner the Commission stated (R. 302) that "the existence of completely inadvertent errors would not have led to the inclusion of a special issue and the questioning of WORZ's character qualifications."

In order graphically to show the court below the manner in which the Commission had disregarded the

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[7] This special issue (R. 201-202) was—

"To determine whether in their applications and other reports to the Commission WORZ, Inc., and Central Florida Broadcasting Corporation [sic] have made misstatements of material facts and/or have omitted to state material facts regarding the ownership and/or management of WORZ, Inc., and Central Florida Broadcasting Corporation [sic]."

record in making findings adverse to WORZ, the latter, pursuant to leave granted by the court, included ten appendices[8] to its reply brief exemplifying the Commission's disregard of the record. The Commission's General Counsel then asked for additional time to argue the case. However, during the argument *not one word was uttered by counsel for either the Commission or Mid-Florida attacking the correctness of the appendices* which showed that the Commission, in attempted support of its findings relating to the significant party-in-interest issue against WORZ, relied not upon the record but upon the suggestions of Mid-Florida or of the Commission's Broadcast Bureau as the source of its findings.

The court below affirmed the decision of the Commission with an opinion *per curiam* stating: "After reviewing appellant's contentions, we find no basis for disturbing the Commission's award." (Appx. 1a.) On May 29, 1958, petitioner filed a Petition for Re-

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[8] It is impractical, if not improper, to set forth in this petition the various examples of the Commission's disregard of the record. Suffice it here briefly to note a short illustration provided by Commission Finding 45(d) (R. 222), which was taken *verbatim* from Mid-Florida Exception 16(d) (R. 68). The Finding stated that Mr. Hill, son-in-law of Mr. Murrell, Sr., "testified that the latter 'has had absolutely nothing to do with the television application, its preparation, prosecution or anything else' " and that "since June 1952, Murrell, Sr., had not actively participated in any way in the business affairs of the AM station in Orlando." But *there were omitted Mr. Hill's explanation and amplification,* which were brought out, inadvertently no doubt, by Mid-Florida's own counsel (R 318), that Mr. Murrell, Sr., had had "no official connection" with the activity of the station, but that "as my father-in-law and as my friend and as a fellow resident of Orlando we have had private conversations relative to all of my activities." (Mr. Hill was manager of the station.)

hearing *en banc*. (R. 394-400.) This was denied on June 10, 1958. (Appx. 3a.)

REASONS FOR GRANTING THE WRIT

Petitioner believes that the court below has failed, in two major respects, to perform its statutory duty in reviewing the herein decision of the Federal Communications Commission. First, it has failed to require the Commission to make findings based upon the whole record and not merely upon those portions that suit its purpose. Second, it has condoned the action of the Commission in prejudging an issue and thus making impossible a fair hearing thereon as envisioned by the Administrative Procedure Act and guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. In both respects, the decision below, if permitted to stand, would have a serious impact upon procedure not only before the Commission but also before other Federal regulatory agencies and upon the Constitutional and statutory safeguards provided for persons regulated by such agencies.

1. Section 10(e) of the Administrative Procedure Act requires that the court "shall review the whole record or such portions thereof as may be cited by any party". This Court, in *Universal Camera Corporation v. National Labor Relations Board,* 340 U. S. 474, at 488, in referring to the Administrtaive Procedure Act, stated: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that courts consider the whole record."

As heretofore mentioned, petitioner, in its reply brief below, included ten appendices exemplifying the Commission's omission of parts of the record that detracted from the weight of the evidence which it incorporated in its findings upon the decisional question of the candor of the members of the Murrell family. The Commission considered so important those "factors not normally present in comparative hearings" that it devoted 23 findings (#32-55, R. 213-228) and 20 conclusions (#48-68, R. 294-304) thereto. Far more oral testimony was devoted to these factors than to the other phases of the case.[9] Therefore, the Commission had a large volume of material from which to select only that which supported its objective. The *per curiam* opinion, by implication, sanctions this practice and, unless this Court asserts itself, the way will be open for a reversion to the pre-Administrative-Procedure-Act tendency to approve administrative findings if there be "substantial evidence" to support them regardless of the fact that there might be incontrovertible other evidence of record which would destroy it. As stated by this Court in the *Universal Camera* case, supra, that was the reason for the insertion of Section 10(e) requiring reviewing courts to consider the "whole record".[10] This the lower court obviously failed to do.

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[9] The Record here includes the Joint Appendix below which contains 391 letter-size pages but does not include the many pages of the Commission's decision which were not necessary to a consideration of the points raised on appeal.

[10] In sole support of its inaction, the *per curiam* opinion cites *Tampa Times Co. v. Federal Communications Commission*, 97 U. S. App. D. C. 256. However, in that case the "crucial consideration" was admittedly the "Commission's judgment" upon the past record of the key figure in the successful corporate appli-

2. This Court has held that in administrative proceedings of a semi-judicial character there must be recognized the "rudimentary requirements of fair play" (*Morgan v. United States* (1938), 304 U. S. 1, 14-15), and that a fair hearing is "essential to due process" (*Ohio Bell Telephone Co. v. Public Service Commission of Ohio* (1937), 301 U. S. 292, 300). Inherent in the Administrative Procedure Act is the same guarantee of a fair hearing that is inherent in the due process clauses of the Constitutional Amendments.[11] The framers of the Act designed it to provide "fairness in administrative operation".[12] Indeed, it bears the pre-title designation "An Act to improve the administration of justice by prescribing fair administrative procedure." And it has been held that the Act, if its purpose be given effect, should go far toward doing away with the appearance of unfairness sometimes made by a record in which a Board acts as both accuser and judge. *National Labor Relations Board v. Robbins Tire & Rubber Co.*, (C.C.A. 5th Cir. 1947), 161 F.2d 798, 799.

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cant. In this case it is not a question of the Commission's *permissable judgment* but of the Commission's *disregard of proved facts.*

[11] In the *Ohio* case there was involved the application of the due process clause of the Fourteenth Amendment. However, it is well established that this was employed in the same sense and has the same legal import as the identical clause of the Fifth Amendment. *Hurtado v. California* (1883), 110 U. S. 516, 534-5; *French v. Barber Asphalt Paving Co.* (1901), 181 U. S. 324, 329; *Magnano Co. v. Hamilton* (1934), 292 U. S. 40, 44; and *Adamson v. California* (1947), 332 U. S. 46, 66.

[12] "As a reading of the bill will demonstrate, it is designed to provide for publicity of information, fairness in administrative operation, and adequacy of judicial review. . . ." House Committee Report, 1946, p. 18; S. Doc. 248, 79th Congress, p. 252.

Both the requirements of fair play and of due process surely dictate that a regulatory agency maintain an open mind as to all issues before it until the record is made and the case comes before it for final decision. In the instant case, as aforesaid, the Commission adopted a special issue to determine whether or not WORZ had made "misstatements" to the Commission. The Examiner found that missstatements had been made by both WORZ and Mid-Florida but that the WORZ misstatements were inadvertent and did not deceive or mislead anyone.[13]

In overruling the Examiner,[14] the Commission stated (R. 302) that "the existence of completely inadvertent errors would not have led to the inclusion of a special issue and the questioning of WORZ's character qualifications." Thus it admitted that its collective mind was made up in a manner adverse to WORZ as to that special issue ***when it was adopted.*** As its decision now stands, with the brief blessing of the lower court, the Commission may, with impunity, conceal the fact that it has determined an issue in its own mind *at the time it adopts it* and thus cause an applicant, ignorant of the fact that it will not be accorded a fair hearing, to go to entirely unnecessary trouble and expense in making a record on a prejudged issue. Such a situation requires correction by this Court.

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[13] Even the Commission's Broadcast Bureau concluded (R. 50) that any "misstatements and omissions were not willful or deliberate."

[14] The Commission observed (R. 302): "We are unable to reconcile the status of Murrell, Sr., with the Examiner's award of a clean bill of health in this rgeard."

CONCLUSION

THEREFORE, in order that the constitutional and statutory standards of procedure as interpreted by this Court may be enforced, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington 5, D. C.

September 8, 1958

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,996

WORZ, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

MID-FLORIDA TELEVISION CORPORATION, *Intervenor*

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

Decided May 15, 1958

Mr. Eliot C. Lovett, for appellant.

Mr. John H. Conlin, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker,* General Counsel, Federal Communications Commission, *Edgar W. Holtz,* Associate General Counsel, Federal Communications Commission, and *Richard A. Solomon,* Assistant General Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Paul Dobin, with whom *Mr. Leonard H. Marks* was on the brief, for intervenor.

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges.*

PER CURIAM: This is an appeal from an order of the Federal Communications Commission, granting television Channel 9 in Orlando, Florida, to intervenor Mid-Florida Television Corporation. Appellant, the unsuccessful applicant, challenges the Commission's action. After reviewing appellant's contentions, we find no basis for disturbing the Commission's award. See *Tampa Times Co.* v. *Federal Communications Commission,* 97 U. S. App. D. C. 256, 230 F.2d 224 (1956).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

No. 13,996

WORZ, Inc., *Appellant*

v.

Federal Communications Commission, *Appellee*

Mid-Florida Television Corporation, *Intervenor*

Appeal from the Federal Communications Commission.

Before Fahy, Washington and Danaher, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the decision and order of the Federal Communications Commission on appeal in this case be, and it is hereby, affirmed.

Dated: May 15, 1958

Per Curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed May 15, 1958. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

No. 13,996

WORZ, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

MID-FLORIDA TELEVISION CORPORATION, *Intervenor*

Before: EDGERTON, *Chief Judge*, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the Court that the petition for rehearing en banc be, and it is hereby, denied.

Dated: June 10, 1958.

Per curiam.

United States Court of Appeals for the District of Columbia Circuit. Filed June 10, 1958. Joseph W. Stewart, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 349

WORZ, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND MID-FLORIDA TELEVISION CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1a) has not been reported. The decision of the Federal Communications Commission is reported at 22 F.C.C. 1254.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1958 (Pet. App. 2a). A petition for rehearing *en banc* was denied on June 10, 1958 (Pet. App. 3a). The petition for certiorari was filed on September 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below, in sustaining the validity of the Commission's findings, met the requirements of the Administrative Procedure Act concerning review of the record.

2. Whether the Commission had prejudged an issue in the proceeding, thereby depriving petitioner of a hearing before a fair and impartial tribunal.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Pertinent provisions of the Fifth Amendment and of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e), are set forth at page 3 of the petition.

STATEMENT

WORZ, Inc. (petitioner), and Mid-Florida Television Corp. (intervenor in the court below) submitted applications for construction permits, both proposing to operate on Channel 9 in Orlando, Florida. The applications, being mutually exclusive, were designated for comparative hearing to determine which applicant would better serve the public interest as a television station licensee. See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327. After a lengthy evidentiary hearing, an examiner's initial decision, the filing of exceptions thereto and supporting briefs, and oral argument before the Commission, it rendered a unanimous decision in favor of Mid-Florida. The principal bases for the decision were the superior broadcast experience of Mid-Florida and the finding that stockholders of WORZ had deliberately attempted to conceal material facts concerning the ownership and operation of the proposed television station and an existing radio station which they controlled.

On appeal, WORZ contested the Commission's determination on some nine grounds, including the Com-

mission's alleged disregard of the record in making findings adverse to WORZ and its alleged prejudgment of the issue of misrepresentations by WORZ. In a short *per curiam* decision, citing *Tampa Times Co.* v. *Federal Communications Commission*, 230 F. 2d 224, the court below unanimously affirmed the Commission's order.

ARGUMENT

1. Petitioner contends that the court below failed to consider the whole record when it determined that the Commission's findings of misrepresentation on the part of WORZ rested on substantial evidence. The standard governing judicial review of administrative findings is well settled (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498), and this Court will intervene in this area only "when the standard appears to have been misapprehended or grossly misapplied" (*Universal Camera, supra,* at 491). Petitioner made no showing that the court below failed to review the entire record pertinent to the contested Commission findings, but seems to suggest (Pet. 11) that, because the court did not set aside these findings, it "obviously failed" to perform its statutory review function.

The Commission was unanimous in the findings which it made, and the court below was unanimous in concluding that the findings had adequate evidentiary support considering the entire pertinent record. Congress has placed in the courts of appeals responsibility for determining whether the findings of federal administrative agencies, such as the Commission, are supported by substantial evidence, and this Court will not ordinarily interfere with the conclusion

reached on this issue. *Federal Trade Commission* v. *Standard Oil Co.*, 335 U.S. 396, 400-401.

2. Petitioner, relying on part of one sentence in the Commission's 95-page decision (Pet. 13, R. 302), contends that the Commission prejudged one of the issues in the case and thus denied petitioner a fair hearing. On this question, the court below also constitutes the appropriate review forum, and the court's rejection of petitioner's contention raises no question warranting review by this Court. Moreover, the claim of prejudgment, since it had not been raised before the Commission, was not properly made a ground for appeal. Communications Act of 1934, Sec. 405, 47 U. S. C. 405; *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

CONCLUSION

The decision below is correct, and no issue calling for review by this Court is presented. The petition for writ of certiorari should therefore be denied.

We believe it appropriate, however, to invite the Court's attention to certain testimony given before the Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce on June 2, 1958, subsequent to the decision by the court below affirming the Commission's order. This testimony (which may be found in the Transcript of Hearings Before the House of Representatives Subcommittee on Legislative Oversight, Volume 11, June 2, 1958, at pp. 957-965) indicates that, while the case was pending before the Commission, an *ex parte* presentation regarding the qualifications of WORZ was made to a member of the Commission by a resident of Orlando. In 1955 this individual represented Mid-

Florida, the successful applicant, in a Florida legal matter while the organization's regular counsel was indisposed. In a letter to the Subcommittee on Legislative Oversight, he stated that he was not associated with either applicant at the time the *ex parte* contact was made and that he had acted on his own initiative "as an interested citizen of this community."

The Commission has instituted an inquiry into the matter pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. 403, and will make public the results of its investigation. Since the matter was not presented to the court below and is not presented by the petition, the Commission does not and would not regard denial of certiorari as foreclosing whatever future action this inquiry may show to be appropriate.

Respectfully submitted,

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Supreme Court, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 968

WORZ, Inc., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

MID-FLORIDA TELEVISION CORP., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT

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October 20, 1968

Press of Byron S. Adams, Washington, D. C.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT

A brief in opposition to the petition for a writ of certiorari herein was filed only by the Federal Communications Commission. In the conclusion it notes that the Commission has instituted an inquiry into the proceedings wherein petitioner's application for television facilities at Orlando, Florida, was denied and that of Mid-Florida Television Corp. was granted. This inquiry is motivated by testimony appearing in

the Transcript of Hearing (pp. 957-965) before the House of Representatives Subcommittee on Legislative Oversight.* This testimony showed that, two days before the Commission issued instructions to its staff to prepare a decision granting the Mid-Florida application, an Orlando friend of then Commissioner Richard A. Mack privately interceded with the latter on behalf of Mid-Florida and strongly in opposition to petitioner. These instructions were in disregard of the Examiner's lengthy Initial Decision which was largely supported by record references and favored petitioner for 12 reasons, giving Mid-Florida not one point of preference. Thus this case must be deemed

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* The Commission's "Notice of Inquiry", adopted October 1, 1958, captioned "In the Matter of Inquiry into alleged *ex parte* representations in a Commission adjudicatory proceeding involving mutually exclusive applications for Channel 9 in Orlando, Florida", and given Docket No. 12,618, reads as follows:

> "The Commission has before it the record of Hearings before the Subcommittee on Legislative Oversight of the House of Representatives Committee on Interstate and Foreign Commerce. This record makes reference to an alleged *ex parte* representation regarding the qualifications of an applicant for a contested television channel in Orlando, Florida, made while the matter was in an adjudicatory status. While a final decision has been rendered in the proceeding (In re Applications of WORZ, Inc., Mid-Florida Television Corp., Dockets Nos. 11081, 11083, 22 FCC 1254) the Commission has instructed its staff to institute an inquiry into the matters raised before the Subcommittee on Legislative Oversight as they may bear on this case. This action is being taken on the Commission's own motion pursuant to the authority vested in it under Section 403 of the Communications Act of 1934, as amended (47 U.S.C. 403). The Commission will report the results of its inquiry and will take such further action as in its judgment appears appropriate at that time."

There was a footnote reference to the pendency of the petition for a writ of certiorari.

to be very much out of the ordinary and to be worthy of special attention. To that end petitioner not only replies to the opposition brief but also suggests that this Court may want to defer consideration of the petition pending the outcome of the inquiry instituted by the Commission.

1. As to the first question raised by the petition, the Commission contends that there was "no showing that the Court below failed to review the entire record". The lower court failed to say enough in its *per curiam* opinion to indicate just what it reviewed. Its statement (Appx. 1a), "After reviewing appellant's contentions, we find no basis for disturbing the Commission's award", would indicate that review was limited to appellant's *contentions;* it does not say that the whole *record,* or any part of it, was reviewed, and surely such review may not be implied. The single illustration cited by petitioner (Pet. p. 9, fn. 8) shows that the lower court did not bother with the *whole* record any more than did the Commission. The petition was certainly not the proper place to recite numerous detailed and cumulative portions of the record in support of the fact that the lower court "misapprehended or grossly misapplied", to use the language of this Court in *Universal Camera Corporation v. National Labor Relations Board,* 340 U. S. 474 at 491, the standard governing judicial review of administrative findings as set forth in the latter case.

2. As to the second question raised by the petition, the Commission complains that reliance is placed "on part of one sentence in the Commission's 95-page decision" to show that the Commission *prejudged* one of the issues that had been inserted against petitioner and thus precluded the possibility of a fair hearing. The

Commission contends that this claim was not properly made a ground of appeal because it had not been raised before the Commission, citing Section 405 of the Communications Act, 47 U. S. C. 405, and *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33.

Of course, prejudgment may be evidenced by a paragraph, a sentence, or by only a few words. The important consideration is the significance of the words used. Here the Commission stated in its conclusions (R. 302) that "the existence of completely inadvertent errors would not have led to the inclusion of a special issue and the questioning of WORZ's character qualifications." This, according to petitioner (Pet. 13), constituted an admission that the Commission's collective mind was made up in a manner adverse to WORZ as to that special issue *at the time it was adopted.* It is submitted that such a preconceived intention is not a question of fact or law on which the Commission must have an opportunity to pass under the provisions of Section 405 of the Communications Act. It may not even be said that the Commission had no opportunity to pass upon the propriety of its preconceived intention. It must have given the matter considerable thought and become convinced that it had a perfect right to insert the special issue in question even though it had already made up its mind as to how it would decide that issue.

Under the circumstances, a petition for reconsideration following the release of the decision could have accomplished only one purpose—it would have given the Commission an opportunity to express itself *more discreetly,* to rephrase its statement so as *not to disclose the fact that it had been guilty of prejudging the issue.* Such an opportunity is comprehended neither

by any rule of reason nor by the *Tucker Truck Lines* case, supra, in which there was involved the question of whether there could properly be raised, for the first time on appeal, an objection to the appointment of the hearing examiner. This Court held that the lower court erroneously entertained the objection, that (at pp. 35-36) the grounds for the objection could have been ascertained long before the record was closed, that there was no suggestion of bias, favoritism, or unfairness, and that the objection was clearly an afterthought based upon "technical compulsion irrespective of considerations of practical justice." Obviously, such a situation is entirely unlike that presented here by proof of *prejudgment* which, *for the first time*, became known to petitioner, the unsuccessful applicant, *when the Commission's final decision was released.*

The inquiry which has been instituted by the Commission into the proceedings which are here the subject of review may well significantly change the circumstances surrounding the controversy; it may even render moot the instant petition for a writ of certiorari. As noted by this Court in *Scripps-Howard Radio, Inc. v. Federal Communications Commission* (1942), 316 U. S. 4, 9, "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during an appeal, despite anything a court can do" and (at p. 10) "judicial review would be idle ceremony if the situation were irreparably changed before correction could be made."

Accordingly, in the interest of ultimate justice with the minimum demand upon the time of this Court, pe-

titioner suggests that consideration of its petition be deferred pending the outcome of the Commission's inquiry into the same subject matter.

Respectfully submitted,

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October 20, 1958